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CHARLES ELMORE

IN THE

Supreme Court of the United States.

OCTOBER TERM 1930.

No. 37.

INTERNATIONAL PAPER COMPANY,
Petitioner,

v.

THE UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

PETITIONER'S REPLY BRIEF.

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Statement.

The Government's brief on the merits constitutes such a radical departure, not only from the line of argument taken by the Government in the Court of Claims and accepted by that court as the basis for its decision, but also from the line of argument adopted in the Government's brief in opposition to our petition for certiorari, as to render it necessary for us to file this reply.

In the Court of Claims, the Government sought to defeat petitioner's claim for just compensation primarily by the argument that the taking of petitioner's water power proceeded under a claim of right and was a lawful incident to the control exercised by the Government over navigable waterways. Alternatively, it was argued that the Government had not "taken" petitioner's "property" within the

meaning of the Fifth Amendment, but had merely frustrated the performance of a contract, for which no compensation was payable, under *Omnia Commercial Company* v. *United States*, 261 U. S. 502. Both lines of argument were in substance accepted by the Court of Claims and made the basis of its decision (R. 65-74). The same arguments were repeated in the Government's brief in opposition to our petition for certiorari; and our main brief was accordingly largely occupied with a discussion of the points above mentioned.*

In its brief on the merits, however, the Government now has seen fit to abandon most of the arguments upon which it has until now relied and has proceeded upon the new theory —not heretofore advanced in the case—that the taking was unauthorized by statute and was, therefore, a mere tortious act of the Secretary of War, for which no compensation can be recovered against the Government. Alternatively, it is now argued that the taking of our water power (although it amounted to a total eviction and expropriation) was not a "taking" in the constitutional sense, but was a mere "regulation",—or, as counsel say at page 14 of their brief, "was, at most, a result of the exercise of the power of the United States to regulate industry and the use of natural resources in time of war, for which no compensation is payable." The fundamental change of position made by the Government in its brief in this Court we presume must be taken as constituting a repudiation of the grounds upon which the Court of Claims below rested its decision, notably the assertion made by the Court of Claims that the Federal Government has a paramount proprietary right in the waters of international streams.

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* Supplementing the argument on the points covered in our main brief, we call the court's attention to a very recent article entitled "New York and its Waters", by Hon. William S. Andrews, formerly a Judge of the Court of Appeals of New York, appearing in the December, 1930, issue of the Cornell Law Quarterly. (Vol. XVI, No. 1, p. 1.)

POINT I.

The taking of petitioner's water rights was pursuant to statute, and was not the mere private or tortious act of the Secretary of War.

Under Point I of their brief (pp. 6-11) counsel for the Government call attention to the undisputed rule of law that unless a taking of private property is made under lawful authority it does not give rise to any valid claim against the United States. With this proposition we do not quarrel. But when counsel go on to assert that the President and the Secretary of War, when they took our water power in the name of the United States, under the requisition order of December 28, 1917, were acting without any warrant or authority of statute, and were therefore mere tortfeasors, we must emphatically disagree.

At the outset it is worth while to note again the form of the requisition order under which the petitioner was deprived of its water power. That requisition order (Finding XI, R. 58) was in the form of a letter, signed personally by the Secretary of War, reading as follows:

"Council of National Defense, Washington,

December 28, 1917.

To Niagara Falls Power Company, Niagara Falls, N. Y.

Sirs:

The President of the United States by virtue of and pursuant to the authority vested in him, and by reason of the exigencies of the national security and defense, hereby places an order with you for and hereby requisitions the total quantity and output of the electrical power which is capable of being produced and/or delivered by you through the use of all waters diverted or capable of being diverted through your intake canal and/or your plants and machinery connected therewith.

You are directed to make immediate and continuous delivery of such power until further notice. This order

will be given precedence over any and all orders and contracts heretofore placed with you.

You will be paid fair and just compensation for power delivered hereunder.

Kindly acknowledge receipt hereof to the undersigned.

NEWTON D. BAKER,
Secretary of War."

On the day following the delivery of this requisition order, the representative of the Secretary of War wrote to the Power Company a letter containing the following paragraph (Finding XII, R. 61):

> "Please note that the requisition order covers also all of the water capable of being diverted through your intake canal to such extent as it can be used on your machinery. *This is intended to cut off the water being taken by the International Paper Company and thereby increase your productive capacity.* Representatives of the International Paper Company were advised of this contemplated action some time ago and should by this time be prepared for the cut-off." (Italics ours.)

And two days later, on December 31st, the representative of the Secretary of War telegraphed to petitioner's general counsel as follows (Finding XII, R. 62):

> "Power Company has been directed to take water hitherto used by International Paper Co."

Section 120 of the National Defense Act (Act of June 3, 1916, c. 134, s. 120, 39 Stat. 166, 213; U. S. Code, Title 50, Sec. 80) provides as follows:

> "The President, in time of war or when war is imminent, is empowered, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company,

> association, corporation, or organized manufacturing industry.
>
> Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry, * * *".

In case of failure to comply, the President was authorized forthwith to take over and operate the plant.

This section in terms authorizes the President, acting through the head of the proper Department, to requisition from any individual, firm or company "such product or material" as may be required and "which is of the nature and kind usually produced or capable of being produced" by such individual, firm or company. Clearly, this authorizes the requisition of the electrical output of any company, such as the Power Company, which might be needed for war purposes. Now in the case of a company producing electrical power by means of water power, the authority to requisition the electrical power clearly carries with it by implication the authority to requisition the water necessary in producing such electrical power. Such authority, although implied, is necessarily inherent in the express statutory authorization. Moreover, in case a particular company to which a requisition order is directed should fail to comply, the President is specifically authorized forthwith to take over and operate the plant. If the Power Company, for instance, should have refused to recognize the requisition order and the President had proceeded under this authority to take over and operate, clearly the President would have been entitled to exercise the right of expropriation in respect of the Power Company's water power as well as its electrical output. The extent of a statutory authorization is not to be narrowly or unnecessarily restricted, where the circumstances warrant giving to the words used a wider scope, in order fully to carry out the purpose of

the legislation. This is particularly true of a war-time authorization granted to the President as commander-in-chief of the armed forces, or to an agency of the Government acting in the interests of the national defense. *Manufacturers' Land & Improvement Co.* v. *Emergency Fleet Corp.*, 264 U. S. 250, 255. Cf. *Maresca* v. *U. S.*, 277 Fed. 727, 735, certiorari denied 253 U. S. 498.

The wording of the requisition order in the instant case is clearly borrowed in part from the National Defense Act, and it is clear that the Secretary of War, at any rate, construed that act as giving him full authority to make the requisition, and intended to act under it.*

The Government admits as much when it says at page 9 of its brief:

> "Several statutes, such as the National Defense Act (*infra*, pp. 22-23), give the President broad powers with respect to the appropriation of manufactured articles in time of war. It was doubtless under these statutes that the Secretary of War, assumed, in behalf of the President, to requisition the output of the power plant in the instant case."

In the Court of Claims, moreover the Government admitted that the taking was pursuant to statute (although it erroneously attempted to argue that the statute in question was Section 10 of the Lever Act) and went so far as to say (Government's brief in Court of Claims, page 368):

> "It is believed that the defendant is safely within the record when it states that the issuance of the purported requisition was an act by the President, through the

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* At the time when the order was made, there were other statutes which gave to the President wide powers to requisition private property of all kinds in aid of the prosecution of the war, under which he might conceivably have acted in the present case,—*e. g.*, the Naval Emergency Fund Act of March 4, 1917, c. 180, 39 Stat. 1192-3; and the various Appropriation Acts cited *infra*, pp. 7 and 8. The relevant portions of these Acts are set forth *infra*, in the Appendix (p. 18). The last section of the Naval Emergency Fund Act should particularly be noted. It is discussed *infra*, at page 23 of the Appendix.

> agencies adopted by the President, *under authority conferred by congressional action.*" (Italics ours.)

And in Finding XIV (R. 63) the Court of Claims specifically found that the petitioner had been deprived of its water and water rights, not by the unauthorized act of a private individual, not by the act of the Power Company, but "*by the United States*".

The only argument now advanced by the Government as a reason for holding the National Defense Act inapplicable, and the requisition tortious, is apparently based upon the fact that the requisition order was directed to the Power Company and not to the petitioner, and upon the fact that the *res* taken by the Government was not water power, but the electricity produced or "capable of being produced" (the phrase occurs in both the order and the statute) by the use of that water power. The unsoundness of this argument, we believe, is adequately dealt with (though in another connection) at pages 16-22 of our main brief; and we do not believe that any lengthy discussion is required here.

At the time of the taking, there was certainly no doubt in the minds of the Government officials as to what they intended to do, and no doubt as to their statutory authority to do it. The Government intended that the Paper Company's supply should be absolutely cut off.

If there was any defect in authority under the National Defense Act, there was, we believe, ample authority for the taking under the Urgent Deficiency Appropriation Act of April 17, 1917, c. 3, 40 Stat. p. 28, which appropriated:

> "For the national security and defense, and for each and every purpose connected therewith, *to be expended at the discretion of the President*, and to be immediately available and to remain available until December thirty-first, nineteen hundred and seventeen, $100,000,000."*

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* The phrase "exigencies of *the national security and defense*", which repeatedly occurs in both the requisition order and the waiver (R. 58-9) is clearly borrowed from this Act, and indicates that the Secretary had it in mind, as well as the National Defense Act, when he made the seizure.

This appropriation was continued and made available until June 30, 1918, by the Urgent Deficiency Act of December 15, 1917, c. 3, 40 Stat. 429.

When read in connection with the National Defense Act, and even when considered altogether apart from that Act, we submit that this provision of the Urgent Deficiency Appropriation Act constituted ample authority for the action of the President through the Secretary of War in taking petitioner's water supply to increase the output of electrical power requisitioned by the Government from the Power Company's dynamos. Similar provisions of appropriation acts (much more limited in scope) were held by this Court in *United States* v. *North American Company*, 253 U. S. 330, 333, to furnish sufficient authorization from Congress for the taking of private property. In the case of *Hooe* v. *United States*, 218 U. S. 322, cited by the Government at page 7 of its brief, the claimant had received from the United States the entire amount of the appropriation specifically allotted by Congress for the subject matter of his claim (rent for quarters for the Civil Service Commission), and had, notwithstanding that fact, sued for additional compensation. It was held that under these circumstances there could be no implied contract by the United States to pay any additional sums, the claimant having voluntarily granted the use of his property to the Civil Service Commission with full knowledge of the limitation on the appropriation. In the *North American Company* case, on the other hand, this Court said at page 333:

> "The Acts of March 3, 1899, c. 423, 30 Stat. 1064, 1070, and May 26, 1900, c. 586, 31 Stat. 205, 213, making appropriations for barracks and quarters for troops, furnish sufficient authorization from Congress to take land for such purposes, so that the difficulty encountered by the claimant in *Hooe* v. *United States*, 218 U. S. 322, does not exist here".

In view of the broad power granted by the wartime Urgent Deficiency Appropriation Act, we submit that the authority

of the President and the Secretary of War in this case cannot be disputed.

What the Government wanted at that time, what it was entitled, under the clear language of the statutes, to obtain by compulsory requisition, and what it in fact got, was power,—*all* the power that could be produced on the Power Company's dynamos by the use of *"all of the water capable of being diverted"* (R. 61) through the intake canal. This of necessity included, and was intended to include, the water theretofore used by petitioner as well as that used by the Power Company.

When the requisition order was made, the Government had full knowledge of petitioner's rights—had, in fact, taken some pains to inquire as to the extent of those rights (Finding X, R. 56)—and specifically intended to appropriate petitioner's property. The requisition order was a peremptory command,—an act of sovereignty and not an offer to negotiate. *Liggett & Myers* v. *United States*, 274 U. S. 215, 220. By its terms, the Secretary of War undertook to make the requisition in the name of the President "and by reason of the exigencies of the national security and defense".

The order, moreover, was absolute and unconditional on its face. Petitioner's water supply was requisitioned, not by the Power Company, nor by the Secretary of War for the benefit of the Power Company, but by the United States. It was the United States which made the order, and the United States which took the property absolutely under its own control. It is true that by a separate instrument the United States undertook,—after the seizure was complete—to direct what use was to be made of the property which it had taken. But this fact did not render the taking any the less absolute, or any the less a taking *"by the United States"* (Finding XIV, R. 63). In directing that the electric power derived from the seized water supply should be supplied to a designated list of essential war industries, the Secretary of War was still "acting for and on behalf of the United States" and was providing for the "exigencies of the national security and defense",—and so stated, in so many words (Finding

XI, R. 59). It is altogether beside the point for counsel to say (Government's brief, p. 10):

> "We have been unable to find any statute or Executive Order authorizing the Secretary of War to take water rights for the generation of electricity by a private corporation *for the purpose of supplying current to private consumers.*" (Italics ours.)

No such thing was done. By the requisition order the Government took the power absolutely for its own use, and not for "private consumers". Admittedly, upon the making of the requisition order, the seizure became absolute, and the Government became entitled to employ the seized power for its own direct use and benefit: and if it had done so, presumably even Government counsel would admit the legality of the Secretary's act, and the validity of petitioner's claim. If, after the taking, the Government, instead of itself using the power which it had taken, chose rather to direct the manner in which it should be used to best advantage for the winning of the war, that fact cannot alter the nature of the taking, or operate to deprive the petitioner of its right to compensation. Nor can the fact that the Secretary of War, in the exercise of his best discretion, chose to employ the Government's property, after the seizure, in one way rather than in another, furnish adequate ground for counsel now to argue for the first time, thirteen years after the event, that the Secretary misused his discretion, mistook his authority, and became a tortfeasor and trespasser *ab initio*, whose acts the Government may with impunity disclaim and disavow.

Petitioner was not consulted as to the terms of the Power Company's waiver (R. 58-60) and was never permitted by the Government to receive either its own water or the electric power derived therefrom, so long as the requisition order remained in effect. To argue that the execution of this waiver by the Power Company "precludes the idea of there having been any appropriation by the United States" (Government's brief, page 12) is to confuse the essential distinction between the

rights of the Power Company and the rights of petitioner. The petitioner was the lessee of certain water rights from the Power Company, having, under the law of New York, a right to the use of its water amounting to a vested estate in realty. Its water rights were enjoyed adversely to those of the Power Company; and the mere fact that *after* the requisition order had been made, the *Power Company* saw fit to enter into negotiations with the United States as to the manner in which the United States should dispose of the power which it had taken and as to the manner in which the Power Company should receive the "fair and just compensation" guaranteed by the statute and promised by the requisition order, cannot affect *petitioner's* rights.

But the Government attempts to argue that petitioner's only remedy is an action sounding in tort against the Power Company. Such an action would be met at the threshold with the answer that the shut-off of petitioner's water was not effected by the Power Company, but by the United States Government, acting pursuant to statutory authority. In this connection, it is of interest to quote in full the letter written by Mr. Bulkley, as representative of the Secretary of War, to the Niagara Falls Power Company the day after the requisition order was signed:

"Council of National Defense,
Washington, December 29, 1917.

F. L. Lovelace, Esq.,

Niagara Falls Power Co., Niagara Falls, N. Y.

Dear Mr. Lovelace: I mailed yesterday to the Niagara Falls Power Company original requisition order signed by the Secretary of War, covering water power produced and delivered by said company. Enclosed with it was a temporary waiver of delivery, with attached schedule, for execution by the Niagara Falls Power Company. This is all in accordance with our conversations and correspondence and is all designed with a view to disturbing your company's contract relations with its customers as little as possible *while at the same time affording to it full protection against claims on the part of parties who are cut off.* I think you will agree that

the form as finally determined upon covers the purport of all the suggestions which you have made to us.*

Please note that the requisition order covers also all of the water capable of being diverted through your intake canal to such extent as it can be used on your machinery. This is intended to cut off the water being taken by the International Paper Company and thereby increase your productive capacity. Representatives of the International Paper Company were advised of this contemplated action some time ago and should by this time be prepared for the cut off.

With best wishes for a Happy New Year, I am,

Very sincerely yours,

RJB/G ROBERT J. BULKLEY.

(Italics ours.)

The contents of this letter, we believe, leave no doubt as to the intention of the Government in the premises.

Finally, it must be borne in mind that the acts in question were not merely the acts of zealous subordinate officials who might be inclined to overstep the limits of their authority, and whose actions the United States might subsequently disavow. On the contrary, the requisition of petitioner's water was a war measure taken in time of war by the Secretary of War in person,† after careful consultation with the authorities in the United States and in Canada, and after his personally designated representative, Mr. Bulkley, had fully investigated the situation and had been advised as to the nature of petitioner's rights (R. 55-57).

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* The first paragraph of this letter is omitted from the quotation contained in Finding XII of the Court of Claims at R. 61. The whole letter was, however, in evidence before the Court of Claims; and there is no dispute as to its authenticity or its accuracy. In view of the Government's departure from its previous line of argument, and from the theory on which it tried the case below, we believe we are justified in going outside the technical limits of the record in this Court to quote this letter in full.

† Mr. Newton D. Baker, former Secretary of War, was himself examined as a witness below, together with Mr. Bulkley, although, of course, their testimony does not appear in the record in this Court.

POINT II.

The taking of petitioner's water was not a mere "regulation" but was a substantial deprivation of property, for which compensation must be paid.

The Government has further attempted to argue that, assuming the Secretary of War had statutory authority to do what he did, nevertheless his acts amounted at most to a mere regulation and not to a taking of property; and in this connection it is now solemnly suggested by Government counsel that the course which petitioner should have pursued would have been to "refuse compliance" with the Government's requisition order "until assured of adequate protection" (Government's brief, p. 18).

If it was the intention of the Government merely to "regulate", without taking the petitioner's water supply, why did the Government proceed through the elaborate and well recognized form of a requisition or condemnation for public use? Above all, why did the Government specifically promise to pay "fair and just compensation"? If, as counsel now assert, the Government in 1917 and 1918 possessed the right to regulate petitioner's business and property to the point of extinction without being under any liability to pay compensation, it is certainly somewhat odd that no such idea at that time appears to have occurred to any of the officials connected with the transaction.

It may be conceded that under certain circumstances (particularly under the commerce clause) the Government may regulate or limit the use of private property in the public interest. But the act here complained of was not a mere regulation, but a total deprivation. The taking of petitioner's property could not have been more complete or more effective had the Government sent armed troops to occupy petitioner's plant. No case cited by counsel is authority for

the proposition that the Government, even in war time, can forcibly take from a private citizen his real property, and can then refuse to pay compensation upon the ground that the property has not been taken, but has merely been "regulated" in the interests of the Government. The cases cited by the Government at page 18 of its brief were all cases involving Federal or state regulation of carriers, and do not sustain the propositions to which they are applied. Governmental regulation in the sense that under Government order coal in transit, for instance, may be diverted to a designated purchaser is one thing, even though the new destination may result in a slightly lower price per ton. Here the citizen affected is paid for his property. But where by virtue of a direct expropriation the Government takes a citizen's property outright without the citizen receiving compensation of any kind, surely the Government's liability cannot be lightly avoided merely on the assertion that it constitutes a "regulation".

We are at a loss to understand the basis for the argument, repeatedly advanced in the Government's brief, to the effect that petitioner "was advised of the contents of the requisition order, but it was not directed or requested to relinquish its water rights" (p. 12), and to the effect that petitioner should have "refused to comply" (pp. 5, 18) with the Government's requisition order until assured of compensation. We may note, in passing, that refusal to comply with the provisions of Section 120 of the National Defense Act is by that section penalized as a felony. And even apart from that fact, in this case a refusal was physically impossible. The petitioner had nothing to say about the shutting off of its water, and could do nothing to prevent it. It must be remembered that petitioner had no independent source of water under its own physical control. Its supply was not derived directly from the bed of the Niagara River, but from a canal which tapped the main intake canal of the Power Company (see sketch at R. 14a; cf. Finding II, R. 48). When this source was cut off, under the Government's orders, there was nothing for peti-

tioner to do save to shut down its mill. No motive power was left to run the machinery. Petitioner could not have renewed its supply of water, or prevented the cut-off, in any way short of physically taking possession of the intake canal, which would, of course, have required an armed invasion of the Power Company's plant and an attack upon the United States troops who guarded it. Does the Government seriously contend that this is what we should have done?

Nor can we understand what the Government means when it says in its brief (p. 18):

> "Nor does the fact that the Government made no provision for the payment of compensation to the petitioner affect the nature of its action as a regulatory measure. It was doubtless assumed that the petitioner would make such charge as it deemed necessary and collect the same from the companies to which its power was furnished."

The petitioner at no time was engaged in furnishing power to any other company, and had no means of recompensing itself at the expense of others. On the contrary, the findings are clear that all of petitioner's water was used for the purpose of operating the machinery in its own mill (R. 48, 54). When it was cut off, operations at the mill, of necessity, came to a stand-still; and the mill remained shut down until the requisition order was abrogated at the close of the war.

POINT III.

Petitioner is entitled to interest as a part of the just compensation guaranteed to it by the Constitution.

The Court of Claims found (Finding XXII, R. 64) that by reason of the taking of its water supply by the Government, the petitioner sustained "an actual out-of-pocket or direct overhead expense of $304,684.26".

Petitioner submits that to this amount it is entitled to add interest at 6% (the legal rate in New York State) from the date of the taking, in order to secure the "just compensation" to which it is entitled under both the Constitution and the National Defense Act.

This claim is disputed in Point IV of the Government's brief at page 20, the Government taking the position that the recovery to which petitioner is entitled in this case cannot include interest, by reason of the provisions of Section 177 of the Judicial Code.

In attempting to distinguish the numerous cases in this Court which have held that interest may properly be included as a part of the "just compensation" to which a claimant is entitled when his property is taken by the United States, counsel state:

> "But in each of these cases the property was taken pursuant to express statutory authority, without the consent of its owner, and in each case recovery was had under a statute which expressly provided for 'just compensation'."

We are at a loss to understand why this language is not directly applicable to the case at bar. Here our property was certainly taken without the consent of the owner. It was taken pursuant to the provisions, not only of the Constitution, which guarantees just compensation, but of a statute (the National Defense Act), which likewise specifically guarantees "fair and just compensation". Petitioner was not paid for its property at the time of the taking, and has not been paid since. It is entitled now to be put in as good a position as if it had been paid contemporaneously with the taking; and the payment of such additional sums as may be necessary for this purpose is not prohibited by Section 177 of the Judicial Code.

The only case cited by the Government in support of its position is *United States* v. *North American Transportation and Trading Company*, 253 U. S. 330. The inapplicability

of that decision to situations such as the present has more than once been pointed out by this Court, notably in *Seaboard Air Line Railway Company* v. *United States*, 261 U. S. 299, 305, and in *Phelps* v. *United States*, 274 U. S. 341, 344, where the Court said:

> "The distinction between the cause of action considered in *United States* v. *North American Co.*, 253 U. S. 330, and a taking under the power of eminent domain was pointed out in *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299. Plaintiffs' property was taken before its value was ascertained or paid. Judgment in 1926 for the value of the use of the property in 1918 and 1919, without more, is not sufficient to constitute just compensation. Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim for interest within the purpose or intention of that section. Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The Government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking."

CONCLUSION.

The judgment of the Court of Claims should be reversed, and the cause remanded, with directions to award proper compensation to the petitioner, in accordance with the findings of the Court of Claims.

Respectfully submitted.

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PORTER R. CHANDLER,
Attorneys for Petitioner.

APPENDIX.

Statutes Involved.

In this case, it is obvious that the Secretary of War intended to make the requisition under the authority of Section 120 of the National Defense Act; and it is our position that this statute, supplemented if necessary by the authority of the Urgent Deficiency Appropriation Acts cited at p. 7 of this brief, furnishes ample authority for his acts. However, it would probably be equally possible to justify the taking under the authority of the Naval Emergency Fund Act of March 4, 1917, as amended. This latter Act is not confined, as the Government's brief attempts to argue, to the requisisition of ships, but extends to all "war material", which is defined in the Act as including "arms, armament, ammunition, stores, supplies and equipment for ships and airplanes, and everything required for or in connection with the production thereof".

For the convenience of the Court, we here reproduce the whole of Section 120 of the National Defense Act, and the relevant portions of the Naval Emergency Fund Act, and of the applicable Appropriation Acts.

National Defense Act.

Section 120 of the National Defense Act (Act of June 3, 1916, ch. 134, 39 Stat. 166, 213), now embodied in United States Code, Title 50, Section 80, provides as follows:

> "SEC. 120. *Purchase or Procurement of Military Supplies in Time of Actual or Imminent War.* The President, in time of war or when war is imminent, is empowered, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the

nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any plant equipped for the manufacture of arms or ammunition, or parts of ammunition, or any necessary supplies or equipment for the Army, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any manufacturing plant, which, in the opinion of the Secretary of War shall be capable of being readily transformed into a plant for the manufacture of arms or ammunition, or parts thereof, or other necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execution of orders, or who shall refuse to manufacture the kind, quantity, or quality of arms or ammunition, or the parts thereof, or any necessary supplies or equipment, as ordered by the Secretary of War, or who shall refuse to furnish such arms, ammunitions, or parts of ammunition, or other supplies or equipment, at a reasonable price as determined by the Secretary of War, then, and in either such case, the President, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement herein provided for, is hereby authorized to take immediate possession of any such plant or plants, and through the Ordnance Department of the United States Army, to manufacture therein in time of war, or when war shall be imminent, such product or material as may be required, and any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon con-

viction shall be punished by imprisonment for not more than three years and by a fine not exceeding $50,000.

The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just.

The Secretary of War shall also make, or cause to be made, a complete list of all privately owned plants in the United States equipped to manufacture arms or ammunition, or the component parts thereof. He shall obtain full and complete information regarding the kind of arms or ammunition, or the component parts thereof, manufactured or that can be manufactured by each such plant, the equipment in each plant, and the maximum capacity thereof. He shall also prepare, or cause to be prepared, a list of privately owned manufacturing plants in the United States capable of being readily transformed into ammunition factories, where the capacity of the plant is sufficient to warrant transforming such plant or plants into ammunition factories in time of war or when war shall be imminent; and as to all such plants the Secretary of War shall obtain full and complete information as to the equipment of each such plant, and he shall prepare comprehensive plans for transforming each such plant into an ammunition factory, or a factory in which to manufacture such parts of ammunition as in the opinion of the Secretary of War such plant is best adapted.

The President is hereby authorized, in his discretion, to appoint a Board of Mobilization of Industries Essential for Military Preparedness, nonpartisan in character, and to take all necessary steps to provide for such clerical assistance as he may deem necessary to organize and coordinate the work hereinbefore described."

Naval Emergency Fund Act.

This Act is a portion of the Naval Appropriation Act of March 4, 1917, ch. 180, 39 Stat. 1168, at pages 1192-1193. The relevant portions thereof are as follows:

"To enable the President to secure the more economical and expeditious delivery of materials, equipment,

and munitions and secure the more expeditious construction of ships authorized and for the purchase or construction of such additional torpedo boat destroyers, submarine chasers and such other naval small craft, including aircraft, guns and ammunition for all of said vessels and aircraft and for each and every purpose connected therewith, as the President may direct, to be expended at the direction and in the discretion of the President, $115,000,000, or . much thereof as may be necessary, and to be immediately available.

In addition to the eighteen submarines hereinbefore appropriated for, the Secretary of the Navy is hereby authorized and directed to proceed at once to cause to be constructed twenty coast submarines to have a surface displacement of about eight hundred tons each at a cost not to exceed $1,300,000 each, exclusive of armor and armament, on the most approved lines according to plans and specifications to be provided or adopted by the Secretary of the Navy. The same may be let by contract to private builders or constructed by the Government in navy yards, or both, as may be directed by the Secretary of the Navy. Said twenty submarines shall be constructed on the Pacific coast: *Provided,* That the cost of construction on the Pacific coast does not exceed the cost of construction on the Atlantic coast plus the cost of transportation from the Atlantic to the Pacific. Eighteen million dollars is hereby appropriated toward the construction of said submarines.

(a) That the word 'person' as used in paragraphs (b), (c), next hereafter shall include any individual, trustee, firm, association, company, or corporation. The word 'ship' shall include any boat, vessel, submarine, or any form of aircraft, and the parts thereof. The words 'war material' shall include arms, armanent, ammunition, stores, supplies, and equipment for ships and airplanes, and everything required for or in connection with the production thereof. The word 'factory' shall include any factory, workshop, engine works, building used for manufacture, assembling, construction, or any process, and any shipyard or dockyard. The words 'United States' shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States.

(b) That in time of war, or of national emergency arising prior to March first, nineteen hundred and eighteen, to be determined by the President by proclamation, the President is hereby authorized and empowered, in addition to all other existing provisions of law:

First. Within the limits of the amounts appropriated therefor, to place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person. If any person owning, leasing, or operating any factory equipped for the building or production of ships or war material for the Navy shall refuse or fail to give to the United States such preference in the execution of such an order, or shall refuse to build, supply, furnish, or manufacture the kind, quantity, or quality of ships or war material so ordered at such reasonable price as shall be determined by the President, the President may take immediate possession of any factory of such person, or of any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

Second. Within the limit of the amounts appropriated therefor, to modify or cancel any existing contract for the buildng, production, or purchase of ships or war material; and if any contractor shall refuse or fail to comply with the contract as so modified the President may take immediate possession of any factory of such contractor, or any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

Third. To require the owner or occupier of any factory in which ships or war material are built or produced to place at the disposal of the United States the whole or any part of the output of such factory, and,

> within the limit of the amounts appropriated therefor, to deliver such output or parts thereof in such quantities and at such times as may be specified in the order at such reasonable price as shall be determined by the President.
>
> Fourth. To requisition and take over for use or operation by the Government any factory, or any part thereof without taking possession of the entire factory, whether the United States has or has not any contract or agreement with the owner or occupier of such factory."

This last section is of particular significance. It authorizes the President to requisition "any factory or any part thereof without taking possession of the entire factory". In the case at bar, petitioner's water rights, under the laws of New York, constituted real property which was appurtenant to, and a part of, petitioner's Niagara Falls mill (Petitioner's main brief, pp. 11-15). When the Government took those water rights, we submit that it took a part of petitioner's factory without taking possession of the entire factory, within the language of this Act.

Appropriation Acts.

In the Urgent Deficiency Act of April 17, 1917, ch. 3, 40 Stat., at page 28, the sum of $100,000,000. was made available for the national security and defense, at the discretion of the President, in the following language:

> "For the national security and defense, and for each and every purpose connected therewith, to be expended at the discretion of the President, and to be immediately available and to remain available until December thirty-first, nineteen hundred and seventeen, $100,000,000."

The broad language of this statute, we believe, would furnish ample authority for the acts of the Secretary of War in this case, even if it should be held that the National Defense Act, standing alone, is insufficient. See *U. S.* v. *North American Co.*, 253 U. S. 330, 333.

By the Act of December 15, 1917, ch. 3, 40 Stat. 429, the time within which this appropriation was made available was extended to June 30, 1918. A further appropriation of $50,000,000 for the fiscal year 1918-19, was granted, in the same broad terms, by the Act of July 1, 1918, c. 113, 40 Stat. 634, 635.

In the Urgent Deficiency Appropriation Act of October 6, 1917, ch. 79, 40 Stat. 345, at page 369, there was a further appropriation of $100,000,000. to be expended at the direction and in the discretion of the President for such war purposes as he might deem fit.

The provisions of this section of the Act are as follows (40 Stat., at p. 369):

> "To enable the President to secure the more economical and expeditious delivery of materials, equipment, and munitions, and secure the more expeditous construction of ships authorized, and for the purchase or construction of such additional torpedo boat destroyers, submarine chasers, and such other naval small craft, and for each and every purpose connected therewith, as the President may direct, to be expended at the direction and in the discretion of the President, $100,000,000."